United Nations CCPR/C/110/D/1885/2009

International Covenant on Civil and Political Rights

Distr.: General
5 June 2014

Original: English

Human Rights Committee

Communication No. 1885/2009

Views adopted by the Committee at its 110th session (10–28 March 2014)

Submitted by:	Corinna Horvath (represented by counsel, Tamar Hopkins)
Alleged victim:	The author
State party:	Australia
Date of communication:	19 August 2008 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 13 July 2009 (not issued in document form)
Date of adoption of Views:	27 March 2014
Subject matter:	Non-enforcement of judgement providing compensation for police misconduct
Substantive issue:	Right to an effective remedy
Procedural issue:	Non-exhaustion of domestic remedies
Articles of the Covenant:	Articles 2 (para. 3), 7, 9 (paras. 1 and 5), 10 and 17
Article of the Optional Protocol:	Article 5 (para. 2 (b))

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Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (110th session)

concerning

Communication No. 1885/2009*

Submitted by:	Corinna Horvath (represented by counsel, Tamar Hopkins)
Alleged victim:	The author
State party:	Australia
Date of communication:	19 August 2008 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 March 2014,

Having concluded its consideration of communication No. 1885/2009, submitted to the Human Rights Committee by Corinna Horvath under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Corinna Horvath, an Australian national. She claims that her rights under articles 2, 7, 9 (paras. 1 and 5), 10 and 17 were violated by Australia. The author is represented by counsel.

The facts as submitted by the author

2.1 On 9 March 1996, around 9.40 p.m., two police officers, constables J. and D., arrived at the author's house in Summerville, State of Victoria, to inspect the author's car for evidence that it had been recently driven. The constables had issued an unroadworthy certificate the previous day. The author, who was then aged 21, did not allow the police to

* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Christine Chanet, Ahmad Amin Fathalla, Cornelis Flinterman, Yuji Iwasawa, Walter Kälin, Zonke Zanele Majodina, Gerald L. Neuman, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Anja Seibert-Fohr, Yuval Shany, Margo Waterval and Andrei Paul Zlatescu.
The texts of an individual opinion by Committee member Anja Seibert-Fohr, joined by Yuji Iwasawa and Walter Kälin, and an individual opinion by Gerald L. Neuman are appended to the present Views.

remain on the premises as they had no warrant, and she and her companion, C.L., used force to make them leave. The police officers called for reinforcements and, at about 10.30 p.m., eight officers arrived at the house stating that they intended to arrest the author and C.L. for having attacked constables J. and D. on their first visit and that they did not need a warrant for that.

2.2 Constable J. kicked the front door open and in so doing, struck on the face D.K., one of a group of friends who were also present, causing him injury. Then, Constable J. brought D.K. to the floor, struck him on the right side of the head and hit him with a baton across his lower back. Constable J. then pulled the author to the floor and punched her in the face. With the assistance of another policeman, Constable J. rolled the author over and, despite her bleeding nose, handcuffed her, dragged her out to the police van and took her to the police station at Hastings.

2.3 The author suffered a fractured nose and other facial injuries, including bruising and a chipped tooth. She also had some bruising, scratches and abrasions to other parts of her body. The police officers handcuffed the author in a manner that prevented her from reducing the pain and blood flow from her nose or otherwise relieving her injuries. At the police station, she was not provided with immediate medical treatment. Instead, she was left screaming in pain in the cell. She was eventually discovered by a police doctor who contacted her parents, who arranged to have her taken by ambulance to Frankston Hospital. A week later, she was readmitted to hospital for five days in relation to her nose injury. After some months, she recovered from her physical injuries but was left with some scars on her nose and a possible aggravation of hay fever. She also suffered from anxiety and depression, for which she received treatment.

2.4 On 6 June 1997, the author and three other plaintiffs filed proceedings for damages against four police officers individually, and against the State of Victoria under section 123 of the Police Regulation Act 1958 (Victoria), before the County Court of Victoria. On 23 February 2001, Judge Williams of the County Court held that, with regard to the author, Constable J. was liable for assault and malicious prosecution; Sergeant C. was liable for negligence; and all four officers were jointly liable for trespass, wrongful arrest and false imprisonment. The officers were also held to be liable for various similar claims with regard to C.L. and the two remaining plaintiffs.

2.5 Judge Williams ordered the following damages awards: (a) $A 120,000 for negligence against Sergeant C., transferred to the State; (b) $A 90,000 for assault, against Constable J.; (c) $A 30,000 for trespass, wrongful arrest and false imprisonment, against all the defendants, transferred to the State; and (d) $A 30,000 for malicious prosecution, against Constable J. alone. The officers were also held liable for various similar claims in relation to C.L. and the two remaining plaintiffs.[1]

2.6 On 9 April 2001, the State of Victoria filed an appeal against Judge Williams' decision regarding its liability for damages. On 7 November 2002, the Court of Appeal overturned Judge Williams' decision that the State was liable to pay for damages arising from the intentional actions of Constable J. and the negligence of Sergeant C. The Court found that the latter's negligence was not a cause of the injuries to the author, but rather that they were caused by intentional actions that in effect severed the causal chain of liability of Sergeant C. As a consequence, the liability of the officers remained, but the liability of the State to pay damages was overturned. The author was awarded damages totalling $A 143,525. With respect to the claim against the State of Victoria, the author

[1] See para. 4.8.

sought leave to appeal against the judgement of the Court of Appeal in the High Court of Australia, which was refused on 18 June 2004.

2.7 The author filed a complaint to the Ethical Standards Department of Victoria Police. As a result, disciplinary proceedings were launched, but they were subsequently dropped for lack of evidence, despite the strong factual findings against the police officers recorded during the court proceedings outlined above. The author had no standing in the proceedings and was not called as a witness. On 4 August 2004, she made a complaint to the Police Ombudsman which was then transferred to the Office of Police Integrity.

2.8 At the time the author submitted the communication to the Committee, the situation in respect of compensation was as follows: (a) she had not received any damages from the individual police officers; (b) she had not received costs to pay her legal team; and (c) the State of Victoria continued to maintain a legal landscape that absolved its liability to compensate victims of intentional human rights abuses. The situation in respect of disciplinary matters was as follows: (a) all or most of the police involved in the incident remained employed by the State of Victoria, with no disciplinary or criminal action having been successfully taken against any of them, despite Judge Williams' findings of serious misconduct. None of the occupants of the house was consulted by police investigators from the Ethical Standards Department; and (b) the legal system of Victoria does not ensure effective discipline or prosecution of police engaged in human rights abuses.

2.9 Constable J. brought charges against the author for assault against police and traffic infringements, which were dismissed by the Magistrates' Court in Frankston on 9 November 1996. In his judgement of 23 February 2001, Judge Williams found that Constable J. had conducted a prosecution for assault against the author that was not based upon a proper motive, but arose from a mixture of ill-will and a desire to justify ex post facto the general conduct of the police throughout the whole affair. On that basis, Judge Williams found that the tort of malicious prosecution had been committed.

The complaint

Article 2

3.1 The author claims that the State party violated article 2, paragraph 3, of the Covenant, as it did not provide her with an effective remedy. She received no compensation and no disciplinary action was taken against the perpetrators of the assault.

3.2 There is no statutory scheme in Victoria that provides adequate compensation for human rights abuses. Under common law, the State is not responsible for police conduct because when police act on the basis of a power under law, they act independently, not as agents of the State. Section 123 of the Police Regulation Act 1958 remedies that situation only partially by holding the State liable only where police act reasonably in good faith.[2] Moreover, the Act creates an exceptionally narrow class of State liability for actions or omissions of police officers. In order for the State to be liable, the actions of the police must

[2] Section 123 reads:
"Immunity of members
(1) A member of the force … is not personally liable for anything necessarily or reasonably done or omitted to be done in good faith in the course of his or her duty as a member of the force or police recruit.
(2) Any liability resulting from an act or omission that, but for subsection (1), would attach to a member of the force or police recruit, attaches instead to the State.
(3) This section applies to acts or omissions occurring before as well as after the commencement of this section."

be negligent, yet the police must also be acting in good faith, and the act or omission must be "necessarily or reasonably done" in the course of their duty. It is very difficult to imagine a case that satisfies those criteria. In the present case, the trial judge was satisfied that the negligent planning and supervision of the raid by Sergeant C. was a reasonable yet negligent action done in good faith, and that the abuse suffered by the author flowed from that negligence. However, the Court of Appeal overturned that analysis, holding that the actions of the police during the raid effectively severed the causal chain. The Court of Appeal found that there was a "common design" agreed between the officers to commit intentional torts that outweighed any negligence of Sergeant C. in planning the raid.

3.3 Four states in Australia ensure state compensation for victims of police tort even when police actions are intentional or in bad faith. In two of them, the state will pay punitive damages awarded against officers.

3.4 The State party has failed to ensure that the perpetrators are tried before a criminal court. As a result of their status as police officers, they were not brought before a court as any other perpetrator of similar abuse would have been. Furthermore, the State permitted the officers involved to continue occupying positions in which their unacceptable behaviour could be repeated.

Article 7

3.5 The author claims that she was subjected to cruel, inhuman and degrading treatment during the raid. The degradation was enhanced by her being handcuffed, taken into custody and later charged. Her arrest was cruel and unjustified.

3.6 The level of force used against the author during the raid went far beyond the force required to detain her and was not necessary. The trial judge found that Constable J. "pulled her to the floor and began 'brutally and unnecessarily' to punch her in the face, thereby fracturing her nose and rendering her senseless. In the result, Horvath had no recollection of J.'s assault on her. With the assistance of S., J. then rolled Horvath over and, despite her bleeding nose, handcuffed her and then dragged her out to the van".[3]

3.7 Article 7 imposes two obligations on States parties: a substantive (or negative) obligation to prevent violations and a procedural (or positive) obligation to provide an effective investigation into allegations of substantive violations. In the present case, the investigation was carried out by the Ethical Standards Department, a unit within the Victoria Police. The Victoria Police disciplinary system was criticized in a 2007 report of the Office of Police Integrity entitled "A fair and effective Victoria Police disciplinary system". The author's case is mentioned in that report in a manner which makes it clear that the failure of the disciplinary process to hold police accountable is of concern.

3.8 The County Court of Victoria came to clear findings of fault against the police. Despite the fact that the standards of proof in civil and disciplinary proceedings are the same, the disciplinary process failed to achieve the same result. Owing to the failure to investigate the case effectively or use the findings in the civil proceedings as evidence to remove the police perpetrators from duty, the perpetrators remained employed and were not subjected to any form of discipline. That inaction condones a violation of article 7 and effectively authorizes further potential violation of article 7.

[3] Details concerning the author's injuries and psychological consequences are contained in the judgement of the County Court of Victoria.

Article 9 (paras. 1 and 5)

3.9 The author was subjected to arbitrary arrest and detention, in violation of article 9, paragraph 1, of the Covenant. Without a warrant, the police had no right to enter the author's house and arrest her. The detention was not justified or lawful. Judge Williams found that she had been falsely arrested and imprisoned. Furthermore, the State party did not grant her an enforceable right to compensation, which entails a violation of article 9, paragraph 5.

Article 10

3.10 The assault, constraint by handcuffing, arrest, detention and delay in medical treatment suffered by the author were inhumane and a violation of article 10, in addition to article 7. Her detention in a situation in which medical attention was required added to the trauma she experienced.

Article 17

3.11 In the absence of a warrant or a reason to believe that the author had committed a serious indictable offence, the police invasion of the author's house constituted arbitrary and unlawful interference with her home, family and privacy. Furthermore, the malicious prosecution of the author for assaulting Constable J. was an unlawful attack on her honour and reputation and a disproportionate action which could not be justified by any interpretation of a pressing social need.

Exhaustion of domestic remedies

3.12 The author claims that she exhausted domestic remedies in attempting to claim damages from the State of Victoria. She learned through her lawyer that the individual police officers against whom judgement was entered did not have the resources to pay the judgement amount and cost or any substantial portion thereof. Furthermore, the author cannot obtain compensation through the Victims of Crime Compensation Tribunal, since the acts to which she was subjected were non-criminal.

3.13 Section 123 of the Police Regulation Act 1958 provides no effective remedy for victims of police abuse, even when the abuse is the result of misconduct during police operations and procedures. Victims of police abuse in Victoria are reliant on damages being paid by the individual perpetrators. That is problematic because police officers organize their assets in ways that shield them from potential liability to civil actions. In cases where the individual police officer has no capacity to pay or has no assets in his/her name, the victim is not compensated. That is neither an effective compensation scheme, nor does it provide any incentive to the Victoria Police to prevent further abuses.

Remedies sought

3.14 The author seeks: (a) to be awarded compensation, assessed according to the standards applicable under Australian domestic law; (b) that the State party be directed to enact legislation allowing for compensation by the State party for the illegal activities of police officers; (c) that the State party be directed to ensure that people have genuine access to civil action alleging police abuse and receive assistance in that regard, in order to ensure that civil actions have a systemic impact on reform within police agencies; and (d) that the State party be directed to introduce reforms to the current disciplinary procedures applicable to police officers in the State of Victoria to ensure that: (i) all police who are found civilly liable for human rights abuses are disciplined and removed from the force; (ii) the State party prosecutes police who have committed criminal offences; and (iii) police not

subject to civil proceedings are investigated and subject to proceedings that can result in their removal from duty where appropriate.

Observations of the State party on admissibility and on the merits

4.1 The State party submitted its observations on 24 March 2010.

Claims under article 2

4.2 The State party contends that the author failed to substantiate her claim of a violation of article 2. In particular, she failed to substantiate her claim that the four members of the Victoria Police against whom judgement was made did not have the resources to pay the damages awarded and did not have any assets in their names. Furthermore, domestic legal avenues are available to the author to determine whether her assertion is correct. The Rules of the Supreme Court of Victoria set out a process for discovery in aid of enforcement. The Court may, on application by a person entitled to enforce a judgement, order a person bound by the judgement to attend court, be orally examined on material questions, and produce any document or thing in the possession, custody or power of the person relating to the material questions. There is no evidence that the author sought such an order.

4.3 Even if the four members of the police do not have the resources to pay or assets in their names, domestic avenues remain available to the author to recover all or part of the judgement debt. A judgement for the payment of money made in the Supreme Court of Victoria, which includes the Court of Appeal, may be enforced by a number of means, including warrant of seizure and sale, attachment of debts, attachment of earnings, a charging order against the property of the debtor and, in certain circumstances, committal for trial and sequestration (seizure of property). In particular, the Supreme Court Rules provide that a judgement creditor may apply to the Court for an attachment of earnings order. The effect of such an order is that the judgement debtor's employer must pay a reasonable proportion of the debtor's earnings to the creditor. The author is also entitled to apply to the Court of Appeal for an order that the judgement debt be paid by instalments. The author has made no attempt to recover the judgement debt, whether by an order for an attachment of earnings or otherwise.

4.4 In 2003, about six months after the Court of Appeal judgement against Constable J. was entered, he voluntarily chose to become bankrupt. The author has not provided information as to what contact, if any, she had with the trustee appointed to administer Constable J.'s estate in order to ensure that her interests were taken into account in the administration process. Constable J.'s bankruptcy was discharged at the expiry of three years. The author did not seek to enforce the judgement against him following the discharge of his bankruptcy in July 2006.

4.5 According to a document submitted by the author, she learned in 2007 that her lawyer had not taken any steps to recover the judgement debt. Although the author instructed her lawyers in 2008 to take bankruptcy proceedings against the remaining police officers, the bankruptcy register shows no record of any creditor's petition issued in relation to the individual police officers.

4.6 The author has not pursued compensation from the Victims of Crime Assistance Tribunal or its predecessor, the Crimes Compensation Tribunal, despite being eligible to make an application for compensation up to $A 60,000. The absence of a criminal prosecution in respect of the acts of the individual police officers does not preclude application to the Tribunal. The author has therefore failed to exhaust domestic remedies on that basis as well.

4.7 The State party contends that the author's claims under article 2 are without merits. In Australia, the common law rule set out in *Enever v. The King* provides that a "police officer is himself responsible for unjustifiable acts done in the intended exercise of his lawful authority". The liability for such acts is not transferred to the state. Section 123 (1) of the Police Regulation Act 1958 modifies the common law position, providing that a police officer "is not personally liable for anything necessarily or reasonably done or omitted to be done in good faith in the course of his or her duty". Under section 123 (2), liability for such an act or omission attaches instead to the State of Victoria. The outcome is a compensatory scheme whereby, in the event of any unlawful act or omission by a police officer, either the state or the individual police officer will be held liable. That scheme balances an appropriate level of protection and the need to ensure that there is no encouragement to develop an attitude of irresponsibility among police officers. It ensures that there is no scope for impunity and that compensation will be awarded where appropriate. Individual liability has an important deterrent effect. The function of awards of exemplary, aggravated or punitive damages would be undermined if they were simply to be transferred to the state. Consequently, the state's refusal to indemnify acts or omissions of police officers that fall outside the scope of section 123 is consistent with article 2.

4.8 The outcome of the decision of the Court of Appeal of Victoria was that the individual police officers were personally liable to pay damages for assault, trespass, false imprisonment and malicious prosecution. The damages awarded to the author included compensatory damages, aggravated damages and exemplary damages totalling $A 143,525. Of that amount, she was awarded $A 93,525 for the assault against her by Constable J; $A 30,000 for trespass and false imprisonment by all the defendant officers; and $A 20,000 for malicious prosecution against her by Constable J. Hence, the author's right to adequate and effective reparation has been realized. The State party does not accept that the author has successfully proved that she faced difficulties in enforcing the judgement made in her favour, as judicial processes for enforcement are available to her. In any event, a breach of article 2 cannot depend on whether the individual police officers against whom judgement was made have the resources to pay or have assets in their names.

4.9 Regarding the author's claim that the State party breached article 2 by failing to criminally prosecute those allegedly responsible for violating her rights, the State party recalls the Committee's jurisprudence that the Covenant does not provide a right for an individual to require that the State party criminally prosecute another person. Further, the State party has effective legal processes in place to address any alleged violations of inhuman or degrading treatment or punishment by police officers, and those processes have been adequately invoked in the present case.

4.10 The Police Regulation Act 1958 establishes a disciplinary process which is overseen by the Chief Commissioner of Police and undertaken by the Ethical Standards Department of Victoria Police. The Department is responsible for investigating police misconduct and corruption and dealing with service delivery and disciplinary issues. It deals with claims in a prompt and impartial manner. Since November 2004, the Office of Police Integrity has been the independent body that detects, investigates and prevents police corruption and serious misconduct. Furthermore, criminal sanctions are available for conduct constituting serious violations of human rights. The statutory requirement that the Deputy Ombudsman (Police Complaints) be informed of disciplinary investigations provides an important independent check on the adequacy and appropriateness of the disciplinary process.

4.11 As a result of a complaint filed by the author on 21 March 1996, preliminary investigations were undertaken. The Ethical Standards Department informed the author about the status of the investigations on several occasions. When the file was opened, the Department also informed the author that she could make an additional complaint to the Deputy Ombudsman (Police Complaints). The Deputy Ombudsman responded on 30 April

1997 that the time taken to arrange medical treatment for the author was not unreasonable and that the proposal to charge Sergeant C. and Constable J. with disciplinary offences was appropriate in the circumstances. As a result of the preliminary investigation, Constable J. was charged with disgraceful conduct and Sergeant C. with being negligent in the discharge of his duty. An inquiry for Constable J. was conducted on 25 August 1998 and for Sergeant C. on 31 August 1998. As the hearing officer could not reasonably be satisfied on the evidence before him, all charges were dismissed. In respect of the inquiry for Constable J., the hearing officer also noted inconsistencies in the evidence provided by civilian witnesses. At the time the inquiries were concluded, the civil proceedings had not concluded and no findings of fact had been made by the trial judge which could have been considered by the hearing officer. That outcome does not undermine the adequacy of the process to respond to complaints of alleged police misconduct. It is the general practice of the Committee not to question the evaluation of the evidence made in domestic processes.

4.12 The disparity between the findings of the trial judge and the outcome of the disciplinary proceeding can be explained by reference to the different standards of proof which apply in each forum. In disciplinary proceedings involving allegations of serious misconduct, the usual civil standard requiring proof on the balance of probabilities applies, but is increased by an additional requirement that the degree of certainty required must be particularly high given the gravity of the consequences which flow from an adverse finding. That standard is consistent with the serious nature of such proceedings and the punishment, including dismissal, which can result.

Claims under article 7

4.13 Based on the author's failure to make use of all judicial and administrative avenues that offer her a reasonable prospect of redress, the State party submits that the author failed to exhaust domestic remedies. If the Committee finds that the claim under article 7 is admissible, the State party submits that the allegations are without merit.

4.14 The author's treatment did not amount to cruel, inhuman or degrading treatment or punishment. The State party accepts that a conclusion that the treatment was unacceptable or inappropriate is open on the facts, particularly in light of the Court of Appeal's decision to uphold the award of damages to the author for assault and false imprisonment. Nevertheless, her treatment during the incident did not amount to a breach of article 7. For treatment in the context of an arrest to be degrading, there must be an exacerbating factor beyond the usual incidents of arrest. Since arrest, like detention, contains an inherent aspect of humiliation, an element of reprehensibleness must also be present for it to qualify as a violation of article 7. Any exacerbating factor or element of reprehensibleness in the author's purported arrest or detention was insufficient to meet the threshold level of severity required for a breach of article 7. Furthermore, the author has not substantiated the claim that she suffered ongoing adverse physical or mental effects.

4.15 Failure to provide necessary medical attention can, in certain circumstances, amount to a breach of article 7. However, in the present case police records confirm that the author received appropriate and timely medical treatment while in custody. She was treated by a doctor within 20 minutes of arriving at the police station, at 11.00 p.m. on 9 March 1996. At midnight, an ambulance arrived and the author was administered further treatment. She was released from custody at 12.20 a.m. on 10 March 1996 and conveyed to hospital by ambulance. She was readmitted to hospital approximately one week later in relation to her nose injury. There is nothing to suggest that she received anything other than appropriate and timely medical treatment while in detention. On 30 April 1997, the Deputy Ombudsman observed that the time taken to arrange medical treatment for the author was not unreasonable.

4.16 The author claims that the failure to effectively investigate and discipline police involved in the raid condones violations of article 7 and effectively authorizes further potential violations. However, that claim overlaps with her claim under article 2 and should be considered in conjunction with it. States have an obligation to ensure that complaints made in relation to article 7 are investigated promptly and impartially by competent authorities. In the present case, the successful civil action against members of the police demonstrates that individuals remain liable for their acts and omissions. If, as the author proposes, civil liability for all acts and omissions of police officers were to be transferred to the state, it would effectively absolve individuals of their potential individual civil liability. That liability acts as an important deterrent to police officers.

Claim under article 9, paragraph 1

4.17 The State party argues that domestic remedies have not been exhausted and that the claim is without merit. The author's purported arrest and detention should not be characterized as unlawful or arbitrary in the context of article 9, paragraph 1. As was recognized by the Court of Appeal of Victoria, the members of Victoria Police involved in the raid were of the opinion that they had authority to enter the premises and arrest the author under section 459A of the Crimes Act 1958 (Victoria).

Claim under article 10

4.18 The State party argues that domestic remedies have not been exhausted and that the claim is without merit. Further, the author does not clearly identify which treatment is alleged to fall within the scope of article 10.

4.19 The principle that treatment prohibited by the Covenant under article 7 must entail elements beyond the mere fact of deprivation of liberty is also relevant to article 10. Any element of humiliation that may have accompanied the handcuffing and detention was insufficient to meet the threshold required to establish a breach of article 10. Following her arrest, the author was brought directly to the police station, where her handcuffs were removed. Handcuffing, in the context of what was considered to be a lawful arrest, and in the context of her clear non-cooperation with police, was not unreasonable in the circumstances. The author's alleged inability to reduce the pain and blood flow from her nose or otherwise relieve her injuries was insufficient to reach the level of humiliation or debasement prohibited by article 10. Consequently, the purported arrest, handcuffing and detention cannot in themselves amount to a breach of article 10.

4.20 As to the alleged delay in medical treatment, the State party submits that the author's treatment in detention did not breach article 10. Police records confirm that the author received prompt medical treatment while in custody. There was no medical advice to indicate that she should not be detained. The nature of her injuries and the short period of detention are relevant considerations in that regard. The author was briefly admitted to hospital within hours of her arrest and was subsequently discharged. She did not spend a significant period in hospital until almost a week after the incident, indicating that the treatment she required was not urgent.

Claim under article 17

4.21 The State party argues that domestic remedies have not been exhausted and that the claim is without merit. The State party reiterates its arguments in connection with article 9 of the Covenant and submits that the author has presented no evidence to suggest that her honour and reputation were maliciously attacked. To the extent that the charges against her may have been prosecuted without reasonable cause and maliciously, she was successful in her claim for malicious prosecution against Constable J.

Author's comments on the State party's observations

5.1 On 2 July 2010, the author submitted comments on the State party's observations. The author reiterates her allegations and states that she has exhausted all avenues in seeking to recover the judgement debt.

5.2 Once the judgements became enforceable against the individual police officers, letters of demand were forwarded to them seeking payment of the amounts owed to the author. In response, the police officers' counsel informed the author's counsel that Constable J. had declared himself bankrupt and therefore the author was prevented, under the provisions of the Bankruptcy Act, from pursuing any further action against him. As for the remaining defendants, they had minimal assets, according to the research undertaken by the author's counsel. Under Australian law, superannuation is not accessible in a bankruptcy. Therefore, effectively, if any of the defendants were declared bankrupt, they would have no assets which would be distributable to the author and the other plaintiffs. A warrant of seizure and sale, or a charging order against a property of a debtor is only of benefit if there are assets which can be seized or property which can be charged. The author's counsel, having obtained information from the defendants and carried out his own searches, was of the view that any application to issue a warrant or a charging order would be futile and result in no monies being available. Accordingly, the author's counsel opted to attempt to negotiate a settlement. As a result, the non-bankrupt defendants offered a final settlement of $A 45,000, payable to the author and her three co-plaintiffs. That settlement was accepted. Constable J. was obliged to notify the Trustee in Bankruptcy of the money owed to the author. As no communication was received from the Trustee, it was apparent that no funds were available for distribution to the creditors.

5.3 Regarding the State party's observation that the author could have pursued a claim for compensation in the Victims of Crime Assistance Tribunal, she states that the Tribunal does not provide compensation for pain and suffering and focuses on timely and practical measures to assist victims of crime. The Tribunal may award amounts as financial assistance and special financial assistance. Financial assistance is granted for medical and counselling expenses, loss of earnings and damage to clothes during an act of violence. Special financial assistance may be seen as compensatory in nature. The Tribunal awards modest amounts when an applicant suffers any significant adverse effect as a direct result of an act of violence. It uses categories of offences to determine the maximum level of special financial assistance to be awarded. It is possible that in the author's case, if she did not establish that she had suffered a very serious injury, she would be eligible for financial assistance of either $A 130–$A 650 or $A 650–$A 1,300, which are the amounts awarded for offences that result in serious injury and assault respectively. The awards are symbolic and are not intended to reflect the level of compensation to which victims of crime may be entitled under common law or otherwise. An extendable time limit of two years applies to claims before the Tribunal. The presumption is that an application concerning the present communication would be inadmissible, since the incident occurred in 1996.

5.4 Furthermore, the Tribunal does not make any findings of guilt. Its investigative powers are limited to establishing whether an act of violence occurred and whether the application for financial assistance should be granted to meet expenses related to that act. It does not have the capacity to remedy the breaches outlined in the present communication. Accordingly, an award from the Tribunal is not an effective remedy for the author. To comply with the requirement to exhaust domestic remedies an author must access those remedies which are available and effective in redressing the wrong. Such remedies must also provide the State with an opportunity to respond to and remedy the issue within its jurisdiction.

5.5 The author disagrees with the State party's arguments regarding the individual responsibility of perpetrators. It is the State's responsibility to ensure that its police do not

violate human rights and to remedy violations when they occur. By directly compensating victims, the State ensures that its obligations in that respect are fulfilled. Such a position does not relieve the individual perpetrators of liability in civil proceedings. It is also possible for the State to pursue the individual perpetrators for reimbursement. Currently, the practical effect of section 123 of the Police Regulation Act is to absolve the State of responsibility for police who act in bad faith, unreasonably and outside the course of their duty. In the light of that, the State of Victoria is obliged to change its domestic laws, as other states have already done. Furthermore, police violence occurs in part owing to systemic failures in training, oversight and disciplinary measures. State liability for the actions of its agents ensures that such systemic failures are addressed.

5.6 Regarding the State party's observations on the effectiveness of the disciplinary system in Victoria, the author argues that the Ethical Standards Department lacks practical independence and that findings of criminal or torturous conduct against police are rare. She claims that she was not called to give evidence in the hearing of the disciplinary charge against Constable J. and nor were any of the civilian witnesses. The hearing occurred two years after the incident and the investigation took 11 months. Such a delay is inexcusable.

5.7 The author requested a copy of the disciplinary file related to her case, but it was denied to her on the grounds that it would divert too much of the State's resources. The only publicly released information about the process was contained in a brief paragraph in the Office of Police Integrity report entitled "A fair and effective Victoria Police disciplinary system". There was no public scrutiny of the investigation, the hearing or the decision, and no appeal mechanism was open to the author. As for the role of the Deputy Ombudsman as a safeguard of the process, the author claims that mere notification was all that was required and that there is no supervision as such.

5.8 The State party's reference to the standard of proof to explain the difference in outcomes between the disciplinary and the civil proceedings is unjustified and unsupported. It does not address the fact that the disciplinary hearing failed to adduce viva voce evidence from civilian witnesses to the police misconduct, which reflects a systemic and serious failure of the process in circumstances where it was purported that there was insufficient evidence to make a finding of misconduct. The difference in outcomes between the two processes lies in the lack of adequacy, transparency, accountability and independence of the disciplinary hearing process.

5.9 Once the civil proceedings had concluded that the police had lied on matters of major significance, there was the opportunity to reopen or recommence disciplinary proceedings and refer a prosecution brief to the Office of Public Prosecutions. The State failed to pursue those avenues.

5.10 The author reiterates that the treatment to which she was subjected breached article 7 of the Covenant. She was 21 at the time and the treatment was premeditated and intended to punish and intimidate her. She was repeatedly punched, causing very serious and cruel suffering in the form of a broken nose, facial injuries, bruising to her face and other parts of her body, a chipped tooth, loss of consciousness, fear, anguish, distress, intimidation and ongoing psychological conditions. The assault continued while she was helpless and unconscious. The treatment was unnecessarily prolonged by the arrest and transport to the police station, where she continued to be handcuffed. According to Judge Williams, the police viewed the author with "extraordinary bigotry and bias", describing her as a "filthy, dirty, drug-affected female". That provides support for her claim that the intention was to debase, degrade and punish her.

5.11 Regarding the State party's observations with respect to article 9, the author reiterates that the police entry into the house was inappropriate, unjust and unreasonable. It was also unlawful, as stated by Judge Williams. The police could have utilized less invasive

ways to effect an arrest if it was truly necessary, such as obtaining a warrant or conducting static observations of the premises. Even if the entry to the premises was believed to be lawful by individual police officers, it does not mean that what occurred after entry was lawful. The assault and transportation to the police station were not proportionate in the circumstances.

5.12 If the Committee considers that there was no breach of article 9, including paragraph 5, the author submits that those actions violated her freedom of movement under article 12 of the Covenant.

5.13 The author reiterates her claims under article 17. She states that a malicious prosecution by necessity breached her right to privacy and not to be subjected to unlawful attacks on her reputation.

Additional observations from the State party

6.1 In August 2011, the State party submitted further observations on admissibility and on the merits. With respect to compensation under the Victims of Crime Assistance Scheme, the State party argues that at the time of the incidents in question, the author would have been entitled to make a claim under the Criminal Injuries Compensation Act 1983 (Victoria) and to compensation of up to $A 50,000, including an award of compensation for pain and suffering of up to $A 20,000. The categories of special financial assistance relied upon by the author did not come into force until 2000. Awards made under the Scheme serve similar purposes to public law damages available in other jurisdictions, in terms of both compensation and vindication.

6.2 Compensation under the Victims of Crime Assistance Act 1996 is an effective remedy for the purposes of article 2. The author remains eligible to pursue such compensation. As she has not done so, she has failed to exhaust all available domestic remedies.

6.3 In jurisdictions that have a separate public law cause of action for breach of human rights, public law damages may serve the objectives of compensating the claimant for loss and suffering caused by the breach, vindicating the right in question by emphasizing its importance and the gravity of the breach and deterring State agents from committing future breaches. Damages are generally not awarded unless one or more of those objectives is served. Where damages are appropriate, the concern is to restore the claimant to the position in which she would have been had the breach not been committed.

6.4 The State party rejects the author's claim that only full payment of compensatory damages, aggravated damages, exemplary damages and full legal costs by the State of Victoria will constitute an "effective remedy". Section 123 of the Police Regulation Act means that the State of Victoria will be liable for breaches of human rights by individual police officers where those breaches occur in accordance with practices and procedures promulgated by Victoria Police or in circumstances in which the conduct is contributed to by systemic issues such as inadequate training, policies and procedures. It is only when a police officer acts well outside the authorized policies and procedures, such that Victoria Police and the State of Victoria cannot be said to have contributed in any way to the conduct, that the State of Victoria will not be liable for the breach.

6.5 Regarding the claims under article 12, the State party submits that the author has failed to exhaust domestic remedies for the reasons specified above, and that the claim is without merits. The right to liberty and freedom of movement are distinct concepts. While restrictions not amounting to a breach of the right to liberty may in some circumstances amount to a breach of freedom of movement, that will not always be the case. The facts of the current case do not give rise to issues regarding liberty of movement as contemplated in

article 12. Even if that was the case, any restriction on the author's liberty of movement was within the scope of restrictions permitted under article 12, paragraph 3.

6.6 Section 459A of the Crimes Act 1958 (Victoria) provides that a police officer may enter and search premises for the purpose of arresting a person where the officer believes, on reasonable grounds, that the person has committed a serious indictable offence. Entry, search and arrest in those circumstances are actions provided for by law and necessary to protect national security, public order and the rights and freedoms of others.

6.7 As was recognized by the Court of Appeal, the police officers believed that they had the authority to enter the premises and arrest the author under section 459A. While the Court of Appeal ultimately found that the entry and arrest were unlawful, the belief of the police officers should be taken into consideration in assessing their actions.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The author claims that the treatment to which she was subjected in connection with the incidents that occurred on 9 March 1996 and subsequent events violated her rights under articles 7, 9 (paras. 1 and 5), 10 (para. 1) and 17 of the Covenant. The Committee notes that the essence of the claims made by the author before the Committee is based on the same grounds as those she brought before the national judicial authorities. In that regard, the County Court of Victoria established the liability of the police officers who raided her house for trespass, assault, wrongful arrest, false imprisonment, malicious prosecution and negligence. The Court of Appeal found that the individual police officers were liable to pay damages for assault, trespass, false imprisonment and malicious prosecution. The Committee considers that, in addressing the substance of the author's claims, the domestic courts acknowledged that the author's rights had been violated and established the perpetrators' civil responsibility for acts which fall under the scope of the above-mentioned provisions of the Covenant. In view of the acknowledgement by the domestic courts of the civil responsibility of State agents for domestic law violations which are covered by articles 7, 9 (para. 1) and 17 of the Covenant, and their liability to pay damages, the Committee considers that the real issue before it is whether the author obtained an effective remedy for the violations of her rights under the Covenant, after the final decision of the domestic courts became enforceable.

7.4 The Committee notes the author's claims under article 2 that she did not receive full compensation, as established by the national courts, and that no criminal and disciplinary actions were taken against the perpetrators of the assault. The Committee also notes the State party's challenge to the admissibility of the communication on the ground that domestic remedies were not exhausted, as the author did not seek the enforcement of the judgement in her favour, in application of the Rules of the Supreme Court of Victoria regarding the process for discovery in aid of enforcement, following the discharge of Constable J.'s bankruptcy. The State party also claims that the author did not pursue compensation from the Victims of Crime Assistance Tribunal. The Committee further notes the information provided by the author regarding the steps taken to seek the enforcement of the judgement and the final settlement that she and her co-plaintiffs felt obliged to accept.

The Committee notes the author's argument that the awards provided by the Victims of Crime Assistance Tribunal are symbolic and are not intended to reflect the level of compensation to which victims of crime may be entitled under common law or otherwise.

7.5 The Committee considers that, in choosing to file proceedings for damages against the police officers under the Crown Proceedings Act, the author sought an appropriate avenue of redress, as demonstrated inter alia by the fact that she was successful in her judicial claims and that compensation was awarded to her under the Act. The fact that the judgement of the Court of Appeal was not fully enforced, despite the efforts she undertook subsequently in that respect, is not attributable to the author. Accordingly, for the purpose of admissibility, it cannot be expected that, in addition to those proceedings, the author would seek compensation from the Victims of Crime Assistance Tribunal. The Committee therefore concludes that domestic remedies have been exhausted.

7.6 As the Committee does not see any other obstacle to admissibility, it decides that the communication is admissible insofar as it appears to raise issues under articles 7, 9 (para. 1), 10 (para. 1) and 17 of the Covenant on their own and read together with article 2 (para. 3); and under article 9 (para. 5) on its own.

Consideration of the merits

8.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes the author's claims that the State party failed to ensure that the perpetrators be tried before a criminal court and that her complaints before the disciplinary bodies of the Victoria Police were unsuccessful. In that connection, the Committee considers that article 2, paragraph 3, of the Covenant does not impose on States parties any particular form of remedy and that the Covenant does not provide a right for individuals to require that the State criminally prosecute a third party.[4] However, article 2, paragraph 3 does impose on States parties the obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.[5] Furthermore, in deciding whether the victim of a violation of the Covenant has obtained adequate reparation, the Committee can take into consideration the availability and effectiveness not just of one particular remedy but the cumulative effect of several remedies of a different nature, such as criminal, civil, administrative or disciplinary remedies.

8.3 In the present case, the disciplinary claims before the Police Department were dismissed for lack of evidence. In that respect, the Committee notes the author's allegations, uncontested by the State party, that neither the author nor the other civilian witnesses were called to give evidence; that the author was refused access to the file; that there was no public hearing; and that once the finding was made in the civil proceeding, there was no opportunity to reopen or recommence disciplinary proceedings. In view of those shortcomings and given the nature of the deciding body, the Committee considers that the State party failed to show that the disciplinary proceedings met the requirements of an effective remedy under article 2, paragraph 3, of the Covenant.

8.4 The Committee further notes that the author was successful in her civil suit and that compensation was ordered by the national judicial bodies with reference to the police

[4] Communication No. 563/1993, *Bautista de Arellana v. Colombia*, Views adopted on 27 October 1995, para. 8.6.

[5] General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 15.

officers' liability in relation to trespass, assault, wrongful arrest, false imprisonment, malicious prosecution and negligence — unlawful acts of which she was found to be a victim. However, her efforts to seek the enforcement of the final judgement were unsuccessful. In the end, the author was left with no other option but to accept a final settlement involving a quantum which represented a small portion of the quantum granted to her in court.

8.5 With reference to section 123 of the Police Regulation Act (Victoria), the Committee notes that the provision limits the responsibility of the State for wrongful acts committed by its agents without providing for an alternative mechanism for full compensation for violations of the Covenant by State agents. Under those circumstances, the Committee considers that section 123 is incompatible with article 2, paragraph 2, and with article 2, paragraph 3, of the Covenant, as a State cannot elude its responsibility for violations of the Covenant committed by its own agents. In that respect, the Committee recalls that article 2, paragraph 2, requires States parties to take the necessary steps to give effect to the Covenant rights in the domestic order, and to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant.[6] The Committee also recalls that under article 2, paragraph 3, States parties are required to make reparation to individuals whose Covenant rights have been violated. Without such reparation the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation.[7]

8.6 The Committee further considers that actions for damages in domestic courts may provide an effective remedy in cases of alleged unlawfulness or negligence by State agents. It recalls that the obligation of States under article 2, paragraph 3, encompasses not only the obligation to provide an effective remedy, but also the obligation to ensure that the competent authorities enforce such remedies when granted. That obligation, enshrined in article 2, paragraph 3 (c), means that State authorities have the burden to enforce judgements of domestic courts which provide effective remedies to victims. In order to ensure that, States parties should use all appropriate means and organize their legal systems in such a way as to guarantee the enforcement of remedies in a manner that is consistent with their obligations under the Covenant.

8.7 In the present case, the success of the author in obtaining compensation in her civil claim has been nullified by the impossibility of having the judgement of the Court of Appeal adequately enforced, owing to factual and legal obstacles. The procedure established in the domestic law of the State party to remedy the violation of the author's rights under articles 7, 9, paragraph 1, and 17 of the Covenant proved to be ineffective and the compensatory award finally proposed to the author was inadequate, in view of the acts complained of, to satisfy the requirements of an effective reparation under article 2, paragraph 3, of the Covenant. The Committee considers that in situations where the execution of a final judgement becomes impossible in view of the circumstances of the case, other legal avenues should be available in order for the State to comply with its obligation to provide adequate redress to a victim. However, in the present case the State party has not shown that such alternative avenues existed or were effective. The State party refers to compensation under the Victims of Crime Assistance Scheme, but the Committee is not convinced that, given the nature of the Scheme, including its no-fault attributes, the author could indeed obtain adequate redress through it for serious harm inflicted by State

[6] General comment No. 31, para. 13.

[7] General comment No. 31, para. 16.

agents. The Committee notes in that respect that the State party has not provided information about cases in which persons with claims similar to those of the author obtained adequate redress throug. th eme.

8.8 In view of the foregoing, including the shortcomings regarding the disciplinary proceedings, the Committee considers that the facts before it reveal a violation of article 2, paragraph 3, in connection with articles 7, 9, paragraph 1, and 17 of the Covenant. In view of that finding, the Committee will not consider whether the circumstances of the case constitute a separate violation of articles 7, 9, paragraph 1, and 17. Neither will it consider whether there was a violation of article 10, paragraph 1, on its own and read together with article 2, paragraph 3; and of article 9, paragraph 5.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the author's rights under article 2, paragraph 3, in connection with articles 7, 9, paragraphs 1 and 5, 10, paragraph 1, and 17 of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future. In that connection, the State party should review its legislation to ensure its conformity with the requirements of the Covenant.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure for all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them widely in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Appendix I

Individual opinion by Committee member Anja Seibert-Fohr, joined by Committee members Yuji Iwasawa and Walter Kälin (partly dissenting)

1. The main issue of the present case is the State party's failure to recognize its responsibility for the violent police misconduct. On 9 March 1996, as established by the Country Court of Victoria, the author was tackled by a police officer who pulled her to the floor and began to brutally punch her face rendering her senseless and leaving her with a badly beaten and broken nose. She was rolled over and handcuffed despite her bleeding nose and dragged to a van. Although the County Court established the individual police officer's civil liability on those grounds, the State party continues to deny responsibility for cruel, inhuman or degrading treatment. We regret that the majority of the Committee decided not to consider that important aspect of the case and instead characterized the remedies available to the author as the real issue. To our minds, given the gravity of the ill-treatment and the State party's denial of responsibility, it was indispensable for the Committee to find that the police officer's acts, which were clearly attributable to the State party, amounted to a violation of article 7. Such a finding also would have provided the necessary precondition for the Committee's analysis of the author's compensation claim under article 2, paragraph 3, which does not provide for an independent, free-standing right.

2. We concur that the violation of article 7 was insufficiently remedied because the author neither received any payment for the ill-treatment inflicted on her by Constable J., nor was her ill-treatment subject to an independent official investigation to which she had access. The procedure established under domestic law thus did not provide the author with an effective remedy as required under article 2, paragraph 3 (a), of the Covenant. The Committee's reference to subparagraph (c), however, is misleading as it was not the failure to enforce a judicial remedy but the failure to provide for an effective remedy in the first place which led to a violation of article 2. We emphasize that aspect because without that clarification, the Committee's reasoning might be understood as granting a right to have domestic civil remedies effectuated even to the extent that they go beyond the requirements of article 2, paragraph 3 (a), such as by providing for punitive damages. That is not what article 2 requires and therefore the Committee's conclusion that the State party is under an obligation to provide the author with an effective remedy, including adequate compensation, should be read on the basis of an understanding which is informed by an autonomous interpretation of article 2.

3. We disagree with the Committee's finding that section 123 of the Police Regulation Act 1958 (Victoria), which provides that the State incurs responsibility for a specific category of police misconduct, is incompatible with article 2. In fact, the damage award ordered by the County Court initially had been transferred to the State on the basis of that Act. The failure to provide for an effective remedy did not result from that provision, but from the subsequent application of common law to the case by the Court of Appeal in combination with the State party's failure to establish the availability of an alternative remedy for cases in which individual officers lack the means to pay compensation. We emphasize that point in order to highlight the particularity of the present case and to avoid misunderstandings which could give rise to an overly broad interpretation of the Committee's views.

[Done in English. Subsequently to be issued also in Arabic, Chinese, French, Russian and Spanish as part of the Committee's annual report to the General Assembly.]

Appendix II

Individual opinion by Committee member Gerald L. Neuman (partly dissenting)

1. I agree in substance with the dissenting opinion of my fellow Committee members. I write very briefly to note a few other aspects of the Committee's Views with which I cannot concur.

2. The majority View cuts too many corners in dealing with the issues that do not relate to the brutal attack by Constable J. that violated article 7. It treats most of the claims as a unit, although they are different in their character and in their factual bases, and it does not give sufficient consideration to the author's settlement with the other three officers.

3. Moreover, it would be wrong to suggest that the State party has refused to "enforce" a judgement of its domestic courts. The tort judgement, granting damages in magnitudes that exceed the requirements of the Covenant, ran only against the individual officers by its own terms. The majority more appropriately shifts in paragraph 8.7 to the subject of "alternative avenues" by which the State party would provide the author adequate compensation from public funds, which was definitely not what the court's judgement entailed.

4. My concern about the majority's expression of its reasons extends beyond the present case. The overly generalized way in which the majority discusses the issues obscures significant distinctions among violations for which different remedial responses may be sufficient and may have been sufficient in the present case. The Committee should engage in more nuanced discussion of obligations under article 2, paragraph 3, in the future.

5. Unfortunately, my ability to address those issues here is impaired by the fact that the United Nations has insisted upon imposing a word limit on the Committee's Views for budgetary reasons. That practice is antithetical to the Committee's carrying out of its responsibilities, and should be abolished.

[Done in English. Subsequently to be issued also in Arabic, Chinese, French, Russian and Spanish as part of the Committee's annual report to the General Assembly.]